IN THE

Supreme Court of the United States

October Term, 1972

No. 72-381

BUSINESSMEN AFFECTED SEVERELY BY YEARLY ACTION PLANS, INC. (BASYAP, INC.), *et al.*,

Petitioners,

v.

DISTRICT OF COLUMBIA REDEVELOPMENT LAND AGENCY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to The United States Court of Appeals for The District of Columbia Circuit

REPLY TO BRIEF FOR THE FEDERAL AND DISTRICT OF COLUMBIA RESPONDENTS IN OPPOSITION

Respondents' brief in opposition to the petition for certiorari asserts that this case presents no substantial question for review by this Court.

But in their attempt to justify this assertion, the Respondents have themselves indicated the substantial nature of the questions presented for review. The proposal which the

Petitioners have challenged in this case is the condemnation by the government of a substantial area in the downtown district of Washington, D.C.; the destruction of all existing buildings in that area; a destruction the necessary result of which will be the elimination of 130 small individually owned business entities.[1] For some members of the plaintiff association, the proposed plan will mean the destruction of businesses to which they have devoted their entire lives. In other instances, the businesses which the Respondents propose to destroy are the product of the work of two or more generations in the same family.

I

THE FAILURE OF THE RESPONDENTS TO PERMIT THE PETITIONERS TO SUBMIT EVIDENCE THAT THE AREA IN QUESTION CAN BE REHABILITATED WAS AN ABUSE OF DISCRETION.

The Respondents assert in their brief:

> There is no 'substance to petitioners' charge (Pet. 11-13) that HUD unlawfully refused them a hearing and unlawfully refused them access to its files. There is no statutory provision for a formal or informal hearing and no HUD machinery for an adjudicatory proceeding. (Respondent Br. 4)

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[1] The forced removal of established businesses pursuant to a plan for urban renewal has almost invariably, according to past experience, meant the total destruction of those businesses. Secretary Romney, one of the Respondents in this case, has, by his own public testimony, supported this conclusion.

In this attempt to demonstrate that there is no substantial question, the Respondents have made it absolutely clear that this case involves a substantial question of due process.

> . . . where governmental action seriously injures an individual, and the reasonableness of the action depends on fact finding, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. (*Greene v. McElroy*, 360 U.S. 496 (1959)

The Constitution requires such an adjudicatory proceeding where the outcome of a proceeding turns on an accurate resolution of specific factual disputes, See, *e.g., Goldberg v. Kelly*, 397 U.S. 254, 266, 267 (1969); *Thorpe v. Housing Authority*, 393 U.S. 268, 281, 282 (1969); *Avent v. Newark Housing Authority*, 393 U.S. 870.

In this case, the reasonableness of the urban renewal plan depends upon the resolution of specific fact issues. Included in those specific fact issues are

(1) Is the area which the Respondents propose to destroy a blighted or slum area?

(2) Can the purposes of urban redevelopment be accomplished by rehabilitation?

Without the specific resolution of those fact issues against the Petitioners, the Secretary of Housing and Urban Development was not authorized to fund the Downtown Renewal Project. The record in this case shows that the Secretary did not himself resolve these fact issues, but, on the contrary relied upon the determinations which had been made by the local authorities, to wit Respondent DCRLA. Passing over the question whether the Secretary had a legal

right to rely upon the determinations of others as to these vital issues (See, *e.g., Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402; *D.C. Federation of Civic Associations v. Volpe,* D.C. Cir., No. 24,838), Respondents' contention that the Secretary could make such factual determinations without allowing citizens adversely affected by the decision to present contradicting evidence and without considering that opposing information, raises a substantial issue as to the Constitutional permissibility of his action. Cf, *Shannon v. United States Department of Housing and Urban Development,* 436 F.2d 809 (C.A. 3, 1970). Yet, Respondents admit (Brief, p. 6, fn 3) that the Secretary did not in fact consider the substantial and authoritative evidence presented by Arthur Cotton Moore which demonstrated that the area was not a substandard one and that all legitimate aims of urban renewal could be accomplished, at less cost, by rehabilitation programs. They seek to excuse this by asserting that the Moore Plan was not presented to the Secretary by the local authorities.[2] who, of course, were asserting a position diametrically opposed to that of the Petitioners.

Thus, Respondents, in attempting to maintain the contention that the case presents no substantial issue have, in fact, conclusively demonstrated that the case raises a serious and substantial question as to the constitutionality, under the due process clause, of the authority claimed by the Secretary.

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[2] Petitioners attempted to timely present the Moore Plan to the Secretary via Respondents NCPC, City Council, and the Secretary himself as early as August 1971 and through September 1972, the City Council refusing to even consider the Moore Plan as an alternative. See Petition, fn. 18.

II

THERE IS A SUBSTANTIAL QUESTION OF THE VALIDITY OF THE SECRETARY'S DETERMINATION, IF HE MADE SUCH A DETERMINATION, THAT THE PURPOSES OF URBAN RENEWAL COULD NOT BE ACHIEVED WITHOUT THE DEMOLITION OF THE BUILDINGS AND THE RESULTANT DESTRUCTION OF PETITIONERS' BUSINESSES.

Respondents represent to the Court that there is no substantial issue because the Secretary has determined that the program is adequately designed to eliminate slums and urban blight. (Respondents' Brief, p. 5) The argument proceeds upon the assumption that the Secretary may accept the determination of the local authorities as to this fact question, and argue, on the basis of *Berman v. Parker,* 348 U.S. 26, that the means of accomplishing the project are for Congress alone to determine.

This argument, of course, raises a substantial question as to the extent to which Congress has made a determination as to the means for carrying out this project, and whether the Secretary has disregarded that Congressional finding. The statute provides:

> . . . no contract shall be entered into for any loan or capital grant under this subchapter for any project which provides for demolition and removal of buildings and improvements unless the Secretary determines that the objectives of the urban renewal plan could not be achieved through rehabilitation of the project area. . . . [42 U.S.C. 1460 (c) 10 (A)]

The brief of the Respondents nowhere asserts that the Secretary made any such finding, and he did not make

any such finding of fact. The Secretary's conclusion that the purposes of the urban renewal plan can be accomplished through the demolition of these buildings is a finding far different from that required by the statute; to wit, that those purposes cannot be accomplished without the destruction of the buildings. In point of fact, the ends and purposes of the urban renewal project can be accomplished, through the Arthur Cotton Moore Plan, which envisages the utilization of air rights. The Secretary has refused to consider the Arthur Cotton Moore Plan, although urged to do so by other governmental agencies, including the National Capital Planning Commission, the Council on Environmental Quality, and the Department of Interior as late as August 1972. (See, Final Environmental Impact Statement for District of Columbia Neighborhood Development Plan Modification via Disposition Controls to the Downtown Urban Renewal Area, Project No. D.C. A-1-1, Vol. III, Commentaries, 2, 7, 5, Exhibit to Government Motion to Dissolve Injunction, *BASYAP v. DCRLA*, D.C. D.C. 99-72) In fact, the Secretary actually found that all of the purposes of that plan could be achieved through the Arthur Cotton Moore Plan. (*Op. cit.*, Vol. I, Matrix I, following p. III-24)

Whether the Secretary's determination rejecting the Moore Plan constitutes arbitrary executive action in plain contravention of the Congressional direction presents, we submit, a substantial question which this Court ought to consider fully.

The approved urban renewal plan, stripped of its ornamentation, is for the seizure under public authority of the property of one group of private persons who are classical small-businessmen in a purely commercial area, in order to give it to other private persons, who represent big business

to develop the area commercially. The Respondents assert that they are empowered to do this under the authority of *Berman v. Parker*, 348 U.S. 26.[3] The twenty years which have followed this decision have been an unrelieved disaster for the owners of private property in affected areas, as the Secretary himself has testified.

The viability of any decision of this Court, as is true, of any other court, is the result of that decision. The test of the law, as Mr. Justice Holmes remarked, is not logic but experience. In the light of that experience, *Berman v. Parker*, 348 U.S. 26, should be re-examined for the purpose of determining whether the taking of private property for the benefit of other private persons is constitutionally permissible. Such a re-examination presents an especially substantial question where, as here, the respondents attempt to utilize the asserted authority of Congress as a justification for proceeding in direct defiance of the Congressional determination that private property and private business is not to be destroyed unless it is absolutely necessary to accomplish the public purpose of rehabilitating housing areas of cities.

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[3] See fn 1 of Respondents' brief. Their reliance on *Berman v. Parker* is patently misplaced and clarification is in order. The area in *Berman* was predominantly residential, only 5.1% of the land being "First Commercial" and 6.7% being "Second Commercial" for a total commercial land usage of 11.8% (See case below 117 F. Supp. 705, at 709) and the urban renewal plan therein called for total residential usage with parks, playgrounds, whereas the Plan herein calls for demolishing all structures (which are all used commercially) in a purely commercial area and turning it over to other private persons to develop commercially.

III

WHETHER THE REQUIREMENT THAT THE PETITIONERS PRESENT THEIR VIEWS THROUGH A HOSTILE PRIVATE ORGANIZATION IS "FAIR PLAY," AND THEREFORE CONSTITUTIONALLY PERMISSIBLE, PRESENTS A SUBSTANTIAL ISSUE WHICH THIS COURT SHOULD CONSIDER.

The petition for certiorari and the brief in opposition demonstrate that the parties are in agreement that community participation in the planning stages is a pre-requisite for a valid urban renewal plan.

However, the respondents assert that the petitioners had full opportunity to participate through meetings and hearings organized by Downtown Progress. (Respondent's Brief, p. 6).

Again, in attempting to indicate that there are no substantial questions, the respondents have themselves demonstrated just how substantial those questions really are.

Downtown Progress is not a governmental organization. On the contrary, it is a private organization, some of whose members may very well be included in the list of the beneficiaries of the seizure of private property in the case for redevelopment by others. Downtown Progress is an organization of large business interests, whereas Petitioners represent and are members of the small business community. The potential conflict is obvious, their respective interests could not be more diametrically opposed.

However, Respondents blandly assert that the opportunity for Petitioners to attend the public meetings sponsored by these conflicting interests is a sufficient compliance with the admitted requirement that Petitioners be afforded an opportunity to participate in the decision making process.

The very statement of that position, if it does not itself refute Respondents' contention, certainly demonstrates that there is a substantial question whether Petitioners have in fact been afforded a fair opportunity to present their refutation of the facts which have been assembled and presented by Downtown Progress. Whether a hearing is required does not alter the fact that a fair process must afford opportunity for the presentation of conflicting views from those whose substantial interests are to be adversely affected by being destroyed. Requiring those conflicting views to be presented through the conduit of interests diametrically opposed to them is not the "fair play" which the due process clause requires.

CONCLUSION

The respondents' own brief demonstrates the extent and substantiality of the questions presented by this case. The petition for certiorari should be granted.

Respectfully submitted,

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